SUPREME COURT, U.S.
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No. 00-1011

In the Supreme Court of the United States

DEBORIS CALCANO-MARTINEZ, ET AL., PETITIONERS

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that, under 8 U.S.C. 1252(a)(2)(C) (Supp. V 1999), it lacked jurisdiction on direct petitions for review over petitioners' challenges to their final removal orders, but that the district court had habeas corpus jurisdiction to entertain those challenges under 28 U.S.C. 2241.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) will be reported at 232 F.3d 328. The decisions of the Board of Immigration Appeals (Pet. App. 37a-39a, 48a-49a, 66a-74a) and the immigration judges (Pet. App. 34a-36a, 40a-47a, 50a-65a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 1, 2000. On November 21, 2000, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including December 30, 2000. The petition for a writ of certiorari was filed on December 21, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves amendments to the Immigration and Nationality Act (INA) enacted by Congress in 1996. Those changes were designed in large part to reduce the opportunities for criminal aliens to obtain administrative relief from deportation, and to facilitate their removal from the United States by restricting and streamlining the process of judicial review of their deportation orders. Two enactments by Congress are particularly pertinent: the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (enacted Apr. 24, 1996); and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (enacted Sept. 30, 1996).

a. An alien is deportable from the United States if he has been convicted at any time after his admission of an "aggravated felony," as that term is defined in the INA (see 8 U.S.C. 1227(a)(2)(A)(iii) (Supp. V 1999); 8 U.S.C. 1101(a)(43) (1994 & Supp. V 1999)), or of an offense involving controlled substances (see 8 U.S.C. 1227(a)(2)(B)(i) (Supp. V 1999)). Before the enactment of AEDPA, an alien lawfully admitted for permanent residence who was subject to deportation because of a criminal conviction could apply to the Attorney General for discretionary relief from deportation under 8 U.S.C. 1182(c) (1994). To be eligible for such relief, the alien had to show, among other things, that he had had a lawful unrelinquished domicile in this country for seven years, and that, if he had been convicted of an aggravated felony, he had not served a term of imprisonment of five years or more. See 8 U.S.C. 1182(c) (1994).

If the Attorney General denied relief from deportation under Section 1182(c), then the alien could chal-

lenge that denial of relief by filing a petition for review of his deportation order in the court of appeals. See 8 U.S.C. 1105a(a) (1994) (incorporating Hobbs Administrative Orders Review Act (Hobbs Act), 28 U.S.C. 2341-2351 (1994 & Supp. IV 1998)). Under certain circumstances, an alien in custody pursuant to an order of deportation could seek judicial review thereof by filing a petition for a writ of habeas corpus in district court, pursuant to 8 U.S.C. 1105a(a)(10) (1994).

b. In 1996, Congress twice restricted both the substantive eligibility of criminal aliens for discretionary relief from deportation and the availability of judicial review of criminal aliens' deportation orders. First, on April 24, 1996, Congress enacted AEDPA into law. Section 440(d) of AEDPA amended Section 1182(c) to make certain classes of criminal aliens categorically ineligible for discretionary relief from deportation under that Section, including aliens convicted of aggravated felonies and controlled substance offenses, regardless of the duration of the imprisonment actually served. See AEDPA § 440(d), 110 Stat. 1277 (referring to aliens deportable under 8 U.S.C. 1251(a)(2)(A)(iii) and (B) (1994) (now recodified as 8 U.S.C. 1227(a)(2)(A)(iii) and (B) (Supp. V 1999))).

Section 440(a) of AEDPA enacted a related exception to the general availability of judicial review of deportation orders in the courts of appeals for the same classes of aliens. AEDPA Section 440(a) provided that any final order of deportation against an alien who was deportable for having committed one of the disqualifying offenses enumerated in Section 440(d) "shall not be subject to review by any court." AEDPA § 440(a), 110 Stat. 1276-1277 (adding a new subsection (a)(10) to 8 U.S.C. 1105a (1994)). At the same time, Section 401(e) of AEDPA, entitled "ELIMINATION OF CUSTODY

REVIEW BY HABEAS CORPUS," repealed the previous version of subsection (a)(10) of 8 U.S.C. 1105a (1994), which had specifically permitted aliens in custody pursuant to an order of deportation to seek habeas corpus relief in district court. See AEDPA § 401(e), 110 Stat. 1268.

c. On September 30, 1996, Congress enacted IIRIRA into law. In Section 304 of IIRIRA, Congress abolished the old distinction between "deportation" and "exclusion" orders, and instituted a new form of proceeding, known as "removal." See 8 U.S.C. 1229, 1229a (Supp. V 1999); IIRIRA § 304, 110 Stat. 3009-587 to 3009-593. Section 304 of IIRIRA also refashioned the terms on which an alien found to be subject to removal may apply for relief in the discretion of the Attorney General. Congress completely repealed old Section 1182(c). See IIRIRA § 304(b), 110 Stat. 3009-597 ("Section 212(c) (8 U.S.C. 1182(c)) is repealed."). In its stead, for aliens placed in removal proceedings after IIRIRA's effective date, Congress created a new form of discretionary relief, known as cancellation of removal, with new eligibility terms. See 8 U.S.C. 1229b (Supp. V 1999); IIRIRA § 304(a), 110 Stat. 3009-594. An alien convicted of any aggravated felony is ineligible for discretionary cancellation of removal. See 8 U.S.C. 1229b(a)(3) (Supp. V 1999).

Because IIRIRA made sweeping changes to the system for removal of aliens, Congress delayed IIRIRA's full effective date and established various transition rules. As a general matter, Congress directed that most of IIRIRA's provisions, including the new removal procedures, the new provisions for cancellation of removal, and the repeal of Section 1182(c)—all of which were enacted together in Section 304 of IIRIRA—"shall take effect" on April 1, 1997.

See IIRIRA § 309(a), 110 Stat. 3009-625. For aliens who were placed in deportation or exclusion proceedings before that date, Congress provided that most of IIRIRA's amendments would not apply, and that such cases instead would generally be governed by pre-IIRIRA law, including AEDPA, along with transitional rules further restricting judicial review of criminal aliens' deportation orders. See IIRIRA § 309(c), 110 Stat. 3009-625 to 3009-627, as amended by Act of Oct. 11, 1996, Pub. L. No. 104-302, § 2, 110 Stat. 3657 (technical corrections).

Congress also recast and streamlined the INA's provisions for judicial review of removal orders, in Section 306 of IIRIRA, 110 Stat. 3009-607. For removal proceedings commenced after April 1, 1997, Congress repealed altogether the former judicial-review provisions of 8 U.S.C. 1105a (1994), which, before AEDPA, had (at subsection (a)(10)) expressly made the writ of habeas corpus available to aliens held in custody. IIRIRA § 306(b), 110 Stat. 3009-612. Congress replaced those judicial-review provisions with the new 8 U.S.C. 1252 (Supp. V 1999), which reestablished the traditional rule that final orders of removal are subject to judicial review only on petition for review in the courts of appeals. See 8 U.S.C. 1252(a)(1) (Supp. V 1999) (incorporating Hobbs Act). Congress also restricted judicial review of removal orders entered against criminal aliens by providing that, "[n]otwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed" various criminal offenses, including aggravated felonies and controlled substance offenses. See 8 U.S.C. 1252(a)(2)(C) (Supp. V 1999). And Congress enacted a new, sweeping jurisdiction-limiting

provision, 8 U.S.C. 1252(b)(9) (Supp. V 1999), which provides:

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section [*i.e.*, Section 1252].

2. a. Petitioner Deboris Calcano-Martinez (Calcano) is a native and citizen of the Dominican Republic who was admitted to the United States as a lawful permanent resident in 1971. Calcano Certified Administrative Record (Calcano C.A.R.) 39-40, 56. On April 24, 1996, Calcano pleaded guilty in New York state court to attempted criminal sale of a controlled substance (heroin) in the third degree. On October 9, 1996, she was sentenced to an indeterminate term of imprisonment of one to three years for that offense. *Id.* at 48-53.

On June 16, 1997, after the general effective date of IIRIRA, the INS commenced removal proceedings against Calcano based on her heroin conviction. Calcano C.A.R. 63-66. The Notice to Appear charged that Calcano had been convicted of an aggravated felony[1] and a controlled substance offense. *Id.* at 65. At Calcano's removal hearing, the immigration judge (IJ) found that her conviction records established her deportabilty on the two grounds that had been charged. The IJ also concluded that Calcano was statutorily

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[1] The definition of "aggravated felony" in the INA includes "illicit trafficking in a controlled substance * * * including a drug trafficking crime (as defined in section 924(c) of Title 18)." 8 U.S.C. 1101(a)(43)(B) (1994).

ineligible for any form of relief from removal, and ordered her removed to the Dominican Republic. *Id.* at 30-31; Pet. App. 34a-36a.

Calcano appealed to the Board of Immigration Appeals (BIA), where she argued that she was eligible for discretionary relief from deportation under former 8 U.S.C. 1182(c) (1994). The BIA rejected that argument, noting that relief under Section 1182(c) is not available to any alien placed in removal proceedings after the effective date of IIRIRA, which repealed Section 1182(c), and that Calcano is ineligible for cancellation of removal under IIRIRA because of her aggravated felony conviction. The BIA therefore dismissed her appeal. Calcano C.A.R. 3; Pet. App. 37a-39a.

b. Petitioner Sergio Madrid is a native and citizen of Mexico who entered the United States without immigration inspection, and, on December 20, 1989, was granted lawful permanent resident status. Madrid C.A.R. 43-44, 57-58, 71. On September 6, 1994, Madrid was convicted in New York state court of selling a controlled substance (cocaine), and was sentenced to an indeterminate term of between four years and life in prison. *Id.* at 51-54, 56.

On June 24, 1997, after the general effective date of IIRIRA, the INS commenced removal proceedings against Madrid based on his cocaine conviction. Madrid C.A.R. 58, 70-73. The Notice to Appear charged that Madrid had been convicted of an aggravated felony and a controlled substance offense. *Id.* at 72. At his removal hearing before an IJ, Madrid admitted the allegations in the Notice to Appear and conceded his removability as charged. He sought, however, to apply for relief from deportation under former Section 1182(c). *Id.* at 43-45. The IJ ruled that Madrid was

ineligible for that relief, and ordered him removed to Mexico. *Id.* at 29-35; Pet. App. 40a-47a.

The BIA dismissed Madrid's appeal. Madrid C.A.R. 1-2; Pet. App. 48a-49a. In doing so, it concluded that Madrid was not eligible to apply for relief under former Section 1182(c), because he had been placed in removal proceedings after IIRIRA's effective date, when Section 1182(c) was repealed. The BIA also ruled that Madrid was ineligible for cancellation of removal, because of his conviction for an aggravated felony. Madrid C.A.R. 2; Pet. App. 48a-49a.

c. Petitioner Fazila Khan is a native and citizen of Guyana who was admitted to the United States on September 2, 1987, as a lawful permanent resident. Khan C.A.R. 47, 64, 84. On February 13, 1997, after a guilty plea, Khan was convicted in the United States District Court for the Eastern District of New York on one count of unlawful use of a telephone to facilitate the distribution of heroin, in violation of 21 U.S.C. 843(b) and (d) (1994 & Supp. IV 1998). For that offense, she received a sentence of four months' imprisonment, followed by one year of home confinement. Khan C.A.R. 60-62.

On May 13, 1997, after the general effective date of IIRIRA, the INS commenced removal proceedings against Kahn, charging her with removability for having been convicted of an aggravated felony. Khan C.A.R. 6, 84-85. At her removal hearing before an IJ, Kahn admitted the factual allegations against her but denied that her offense of conviction was an aggravated felony. She also sought relief from deportation under former Section 1182(c). *Id.* at 47, 64-65. The IJ ruled that Khan was ineligible for relief under Section 1182(c) and ordered her deported to Guyana. *Id.* at 44-57; Pet. App. 50a-65a.

On appeal to the BIA, Khan renewed her contention that her offense of conviction was not an aggravated felony, and also argued that the IJ erred in finding her ineligible for discretionary relief from deportation. The BIA rejected both arguments and dismissed her appeal. Pet. App. 66a-74a. With respect to the first contention, the BIA ruled that Khan's offense was an aggravated felony under the definition set forth at 8 U.S.C. 1101(a)(43)(B) (1994), which covers "illicit trafficking in a controlled substance * * * including a drug trafficking crime (as defined in section 924(c) of title 18)." The BIA noted that 18 U.S.C. 924(c)(2) (1994) in turn defines a "drug trafficking crime" as "any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.)"—including Khan's offense under 21 U.S.C. 843(b), which is punishable under the federal Controlled Substances Act by a term of imprisonment of not more than four years (see 21 U.S.C. 843(d) (Supp. IV 1998)). Khan C.A.R. 4; Pet. App. 70a-72a. On the latter point, the BIA upheld the IJ's determination that Khan was ineligible for discretionary relief from removal. Khan C.A.R. 5; Pet. App. 72a-73a.

3. Petitioners each filed a petition for review in the court of appeals, and also filed a petition for a writ of habeas corpus in district court. Petitioners contended that, notwithstanding Congress's repeal of Section 1182(c) of IIRIRA, which became effective before they were placed in removal proceedings, they remained eligible for relief from deportation under Section 1182(c), and that Congress's repeal of that provision should not be applied "retroactively" in their removal proceedings, which involved convictions entered before

IIRIRA became effective.[2] The court of appeals consolidated the petitions for review and held that, because of IIRIRA's preclusion-of-review provision at 8 U.S.C. 1252(a)(2)(C) (Supp. V 1999), it lacked jurisdiction over the petition for review filed by each petitioner. Pet. App. 28a-31a, 33a. The court also ruled, however, that petitioners could raise the same challenges to their removal orders in district court by petition for a writ of habeas corpus. *Id.* at 21a-28a, 31a-33a. Indeed, the same day, the same panel of the court of appeals ruled in *St. Cyr* v. *INS*, 229 F.3d 406 (2d Cir. 2000), petition for cert. pending, No. 00-767, that the district court had properly exercised habeas corpus jurisdiction under 28 U.S.C. 2241 over just such a challenge (see 229 F.3d at 409-410), and that Congress's repeal of Section 1182(c) was not to be applied to an alien who had pleaded guilty to an aggravated felony offense before IIRIRA was enacted (see *id.* at 410-421).

The court of appeals followed its prior decisions arising under AEDPA and the transitional judicial-review provisions of IIRIRA (see Pet. App. 10a-15a), which had held that the court of appeals was barred under similar preclusion-of-review provisions from considering any claims raised in direct petitions for review filed by aggravated felons (except to the extent that such petitions directly challenged the BIA's conclusion that the alien was removable because of an aggravated felony), but that the district courts retained habeas corpus jurisdiction to consider challenges to a

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[2] Indeed, petitioners argued that the repeal of Section 1182(c) could not be applied to any criminal *conduct* that occurred before IIRIRA was enacted. See Pet. 17. Petitioner Khan did not renew her contention that her offense of conviction was not an aggravated felony.

deportation order that are "purely legal in nature," *id.* at 32a, including "constitutional challenges and claims that the Attorney General misinterpreted the immigration laws," *id.* at 15a. The court of appeals acknowledged that the Fifth and Eleventh Circuits have held that Congress has "eliminated § 2241 habeas jurisdiction over an alien's challenge to his or her removal proceedings." *Id.* at 18a. The court aligned itself (*id.* at 21a-22a), however, with the Third and Ninth Circuits, which have ruled that "Article III courts continue to have habeas jurisdiction under 28 U.S.C. § 2241 over legal challenges to final removal orders," Pet. App. 21a, and that it is therefore unnecessary to read any exceptions into Section 1252(a)(2)(C), which "bars [the courts of appeals'] jurisdiction over petitions to review removal orders against aliens convicted of certain crimes," *ibid.*

In addition, the court read this Court's decisions in *Felker* v. *Turpin*, 518 U.S. 651 (1996), and *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1868), to hold that "a court cannot presume that a congressional enactment effects a repeal of a jurisdictional statute when it does not explicitly mention the jurisdictional statute or the general type of jurisdiction by name," Pet. App. 22a, and more particularly that "Congress must explicitly mention § 2241 or general habeas jurisdiction to repeal it," *id.* at 23a. The court found "nothing in IIRIRA's permanent provisions that constitutes a sufficiently clear statement of congressional intent to repeal the habeas jurisdiction granted Article III courts by 28 U.S.C. § 2241." *Ibid.*[3] And, the court stated, the

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[3] In particular, the court rejected (Pet. App. 24a-26a) the government's reliance on Section 1252(b)(9), which expressly requires that judicial review of all legal and factual challenges to a

contrary interpretation would "raise a serious constitutional question under the Suspension Clause," *id.* at 28a, for it would leave petitioners without a judicial forum for their challenge to the BIA's determination that they are ineligible for relief under old Section 1182(c).

The court also rejected the government's argument that, even if the district courts could not review the merits of final removal orders by habeas corpus, the courts of appeals would retain sufficient authority to review final removal orders, on direct petitions for review, to satisfy the Constitution. Pet. App. 28a-30a. The government had submitted that, on petition for review, a court of appeals retains authority to entertain substantial constitutional claims, such as constitutional challenges to the INA itself, as well as challenges going to "jurisdictional facts," such as whether the petitioner "is an alien who is removable by reason of having committed a specified criminal offense," and who therefore falls within the preclusion of review in Section 1252(a)(2)(C). *Id.* at 28a. Even assuming that such review remains available in the court of appeals, the court believed that it would be insufficient to satisfy the

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removal decision be had only in the courts of appeals on petition for review of a final removal order. The court acknowledged that this Court, in *Reno* v. *American-Arab Anti-Discrimination Committee* (*AADC*), 525 U.S. 471 (1999) described Section 1252(b)(9) as an " 'unmistakable zipper clause' that channels judicial review of all immigration-related decisions and actions to the court of appeals," Pet. App. 25a (quoting *AADC*, 525 U.S. at 483), but it suggested that Congress enacted Section 1252(b)(9) only for the purpose of "consolidating all claims that may be brought in removal proceedings into one final petition for review of a final order in the court of appeals," *id.* at 26a, and not to foreclose any other avenue by which an alien might challenge his removal order, such as a collateral attack in district court by habeas corpus petition.

Constitution, for, the court believed, "review of statutory questions similar to the one presented in this case has long been deemed essential to ensure that a detained alien receives full due process of law." *Id.* at 30a.

Finally, the court observed that, "if we were legislators, rather than judges, we might opt for a statutory scheme under which an alien's constitutional and statutory challenges are cognizable in the court of appeals pursuant to a petition for review," for such a scheme "would eradicate habeas corpus's duplicative review of legal questions in the district court and the court of appeals and serve Congress's goal to streamline judicial review." Pet. App. 32a. But, the court stated (*ibid.*), "[a]lthough this interpretation may represent sound legislative policy, * * * we do not read IIRIRA or our prior cases to permit such review under" Section 1252(a)(2)(C).

DISCUSSION

1. Petitioners urge this Court to grant review to decide whether, after the comprehensive changes to the INA made by AEDPA and IIRIRA, a court of appeals on petition for review may entertain challenges to the merits of final removal orders, even one going to the availability of discretionary relief, notwithstanding the broad preclusion of review set forth in 8 U.S.C. 1252(a)(2)(C) (Supp. V 1999), and if not, whether the district courts retain authority under 28 U.S.C. 2241 to review such challenges. As petitioners point out, the courts of appeals have reached differing conclusions on those questions.

The Fifth and Eleventh Circuits have ruled that Congress in IIRIRA divested the district courts of authority to entertain a criminal alien's challenge to his final removal order. See *Max-George* v. *Reno*, 205 F.3d 194,

198-203 (5th Cir. 2000), petition for cert. pending, No. 00-6280; *Richardson* v. *Reno*, 180 F.3d 1311, 1318 (11th Cir. 1999), cert. denied, 120 S. Ct. 1529 (2000). By contrast, in addition to the Second Circuit in the decision below (Pet. App. 21a-33a) and in *St. Cyr* (229 F.3d at 409-410), the First, Third, and Ninth Circuits have concluded that the district courts retain such authority. See *Mahadeo* v. *Reno*, 226 F.3d 3, 7-14 (1st Cir. 2000) (holding that district court had habeas corpus jurisdiction under Section 2241 to consider retroactivity challenge), petition for cert. pending, No. 00-962; *Liang* v. *INS*, 206 F.3d 308, 312-323 (3d Cir. 2000), petition for cert. pending *sub nom. Rodriguez* v. *INS*, No. 00-753; *Richards-Diaz* v. *Fasano*, No. 99-56530, 2000 WL 1715956, at *2 (9th Cir. Nov. 17, 2000) (same). The Third and Ninth Circuits have also held, in agreement with the court of appeals in this case, that Section 1252(a)(2)(C) broadly precludes the courts of appeals from entertaining challenges to final removal orders raised by criminal aliens on direct petition for review, including challenges similar to that raised by petitioners in this case. See *Liang*, 206 F.3d at 321-323 (holding that, under Section 1252(a)(2)(C), court of appeals lacked jurisdiction on direct petition for review to entertain similar retroactivity claim, but that district court had jurisdiction to entertain that claim on habeas corpus); *Flores-Miramontes* v. *INS*, 212 F.3d 1133, 1135-1136, 1141-1143 (9th Cir. 2000) (holding that, under Section 1252(a)(2)(C), court of appeals lacked jurisdiction to entertain aggravated felon's contention that his removal proceedings violated procedural due process, but that district court could entertain that claim on habeas corpus).

Because of that conflict in the circuits, as well as the importance of the issue to the administration of the

INA, we have filed a petition for a writ of certiorari in *St. Cyr* seeking review of the Second Circuit's decision upholding the district court's assertion of jurisdiction under Section 2241 in that case.[4] Petitioners do not dispute that the jurisdictional issue presented in *St. Cyr* warrants review, but they argue (Pet. 20) that the Court should grant review in this case as well as (or instead of) *St. Cyr*, to ensure that the Court has before it a case in which a court of appeals dismissed a petition for review for lack of jurisdiction. Petitioners observe (Pet. 21) that the court of appeals' jurisdictional ruling in *St. Cyr* on the continued availability of habeas corpus relief under 28 U.S.C. 2241 was predicated on its jurisdictional ruling in this case that Congress had expressly foreclosed review in the court of appeals to aliens such as petitioners who were convicted of aggravated felonies.

In our view, the Court would benefit from granting review in both this case and in *St. Cyr*, and consolidating the cases for briefing and argument. Granting review in both cases would ensure that the Court has before it both a case that was filed in the district court and a case that was filed in the court of appeals, and can definitely resolve the question of what court, if any, has jurisdiction to review claims such as these. If the Court were to grant review in only one case, however, that case should be *St. Cyr*, for two reasons. First, the question of district court jurisdiction presented in that case has generated a square conflict in the circuits,

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[4] In addition to the certiorari petitions filed in *St. Cyr*, *Mahadeo*, *Rodriguez*, and *Max-George*, mentioned in the text, related jurisdictional issues are also presented by the certiorari petitions in *Zalawadia* v. *Reno*, No. 00-268; *Obajuluwa* v. *Reno*, 00-523; and *Russell* v. *Reno*, No. 00-5970.

whereas no court has found jurisdiction in the court of appeals to entertain claims such as those advanced by petitioners here on a direct petition for review. Second, the *St. Cyr* case would likely bring before the Court the question of court of appeals jurisdiction as well as district court jurisdiction, since the Second Circuit concluded that district court habeas corpus jurisdiction must lie precisely *because*, in its view, review in the court of appeals is precluded by 8 U.S.C. 1252(a)(2)(C) (Supp. V 1999). By contrast, if the Court were to grant review in this case alone and not in *St. Cyr*, it might resolve the issue of the court of appeals' jurisdiction on petition for review without resolving the question of district court habeas corpus jurisdiction presented in *St. Cyr*. In particular, the Court might conclude in this case that the Second Circuit correctly held that court of appeals' review of petitioners' claims was precluded by Section 1252(a)(2)(C), without determining whether the district court had habeas corpus jurisdiction to review the claims, or whether, as the government contends, *neither* court has jurisdiction to consider the specific claims raised by petitioners in this case and the respondents in *St. Cyr*. Thus, the Court might well have to revisit the issue in another case arising from a district court disposition that squarely presented the issue of district court habeas corpus jurisdiction.[5]

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[5] In our response (at 13) to the certiorari petition in *Rodriguez v. INS*, No. 00-753—which, like this case, arises from a court of appeals' (the Third Circuit's) dismissal for lack of jurisdiction of a petition for review filed by an alien who was convicted of an aggravated felony—we observed that it was not necessary for the Court to grant review in that case as well as *St. Cyr* because the Court could effectively resolve all the jurisdictional issues in *St. Cyr* and would have before it in that case the rationale of the Second Circuit's decision in this case. For the reasons stated in the

2. In addition, the Court should grant review in *St. Cyr* (as well as this case) because the Second Circuit's ruling on the merits in that case independently warrants review. As we explain in our certiorari petition (at 27-28) in *St. Cyr*, the court of appeals erroneously ruled in that case that an alien who was convicted on a guilty plea of an aggravated felony before AEDPA and IIRIRA were enacted, but was placed in removal proceedings after IIRIRA's effective date, remains eligible for discretionary relief from deportation under 8 U.S.C. 1182(c) (1994), even though that provision was repealed by IIRIRA. We also explain in our petition (at 28-29) in *St. Cyr* that the Second Circuit's decision on that point conflicts with the decisions of the Seventh and Eleventh Circuits.[6]

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text, however, we now believe, on further consideration, that the Court should grant review both in *St. Cyr* and in a case in which a court of appeals has dismissed a petition for review. If the Court agrees, this case presents a better vehicle than *Rodriguez* for considering a petition for direct review. The Second Circuit, unlike the Third Circuit, has definitively ruled on the jurisdictional issues in *both* a habeas corpus and a petition-for-review case, and the Second Circuit, unlike the Third Circuit, has also definitively resolved the question of the continued availability of relief under former Section 1182(c) for aliens convicted before IIRIRA was enacted but placed in removal proceedings under IIRIRA.

[6] Since we filed our certiorari petition in *St. Cyr*, the Ninth Circuit has also issued a ruling that is inconsistent with the Second Circuit's decision. In *Richards-Diaz, supra*, the Ninth Circuit held that Congress's repeal of Section 1182(c) generally applies to all aliens placed in removal proceedings after the effective date of IIRIRA, regardless of their date of conviction. See 2000 WL 1715956, at *3-*4. The Ninth Circuit also stated, in so ruling, that it found Judge Walker's dissent to the Second Circuit's decision on the merits in *St. Cyr* to be "compelling." *Id.* at *3. The Ninth Circuit also held, however, that "a limited exception to this general rule" is available for an alien who can specifically show that he

The same "retroactivity" claim has been raised by dozens of aliens in both petitions for review and habeas corpus petitions in the lower federal courts and potentially affects the cases of thousands of other aliens who were convicted of aggravated felonies before AEDPA and IIRIRA were enacted. Because that important issue on the merits was reached by the Second Circuit in *St. Cyr* and not in this case, *St. Cyr* most squarely presents that important and widely recurring issue. Accordingly, if the Court concludes that district courts do have habeas corpus jurisdiction to entertain petitioners' claim that the Attorney General may grant them relief under Section 1182(c) notwithstanding Congress's repeal of that provision, the Court could then most readily render a prompt and definitive resolution of that issue on the merits in *St. Cyr*. And a prompt and definitive judicial resolution of that issue is plainly warranted—if, contrary to our submission, it is subject to judicial review at all—in order to terminate the widespread litigation on the issue in the lower courts and to accomplish the expeditious removal of criminal aliens that Congress so clearly intended when it enacted AEDPA and IIRIRA.[7]

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pleaded guilty before the effective date of IIRIRA in reliance on the state of the law at the time, under which he would have been eligible for discretionary relief from deportation. *Id.* at *4. By contrast, the Second Circuit ruled broadly in *St. Cyr* that Congress's repeal of Section 1182(c) cannot be applied to *any* alien who pleaded guilty to a pertinent offense before the enactment of IIRIRA, and the Second Circuit has not required a showing that the alien specifically relied on the state of the law at the time when pleading guilty. See 229 F.3d at 418.

[7] The government's position, as petitioners note (Pet. 5-6), is that neither the court of appeals nor the district court has juris-

CONCLUSION

The petition for a writ of certiorari should be granted, and the case should be consolidated for briefing and oral argument with *INS* v. *St. Cyr*, No. 00-767.

Respectfully submitted.

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diction to review that challenge, and that the "retroactivity" claim in any event is without merit.